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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1545

FRANK J. PATE, Warden of the Illinois State Penitentiary,

Petitioner,

vs.

HONORABLE JOSEPH SAM PERRY, United States District Judge,

Respondent.

REPLY TO ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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Printed by Authority of the State of Illinois

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THE EXTRAORDINARY WRIT OF MANDAMUS IS AN APPROPRIATE REMEDY FROM THE EXTRAORDINARY ABUSE OF DISCRETION EXERCISED BY THE DISTRICT COURT AND FROM ITS ACTION TAKEN DESPITE ITS PATENT LACK OF JURISDICTION SINCE THERE IS NO EFFECTIVE REMEDY OF APPEAL.

If the action of the District Court is permitted to stand, the attempt of the States' to administer their criminal laws can be forever thwarted by the simple expedient of a District Judge ordering the state to file answers to *successive* and *identical* petitions for writ of habeas corpus, awaiting reversal on appeal, and then commencing the process all over again. "The effect of this order is to grant a perpetual stay of proceedings . . ." *Ex parte Simons,* 247 U.S. 231, 232 (1918). Without pleading an intervening change of law applicable to the case, without pleading newly discovered facts, and without pleading inadequacy of the available state remedies, Charles Townsend has been able to thwart the State of Illinois from administering its criminal laws. This is the clear abuse of discretion and usurpation of judicial power that justifies the writ. *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 383 (1953); *Virginia* v. *Rives,* 100 U.S. 313, 323 (1879).

"Here petitioner's basic allegation was a lack of power in a district court to order a mental and physical examination of a defendant. That this issue was substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the federal courts . . ." *Schlagenhauf* v. *Holder,* 379 U.S. 104, 110 (1964). The basic position of the petitioner here is no less substantial than that of the petitioner in *Schlagenhauf.*

In view of these facts the "cryptic order of the Court of Appeals" requires reversal. *Will* v. *United States*, 389 U.S. 90, 98 (1967).

CONCLUSION

Petitioner requests that the Petition for Writ of Certiorari be allowed.

Respectfully submitted,

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